call the classes of those who employ and those who are employed is the keystone of our present national life. Researches in the constitutional history of our country reveal the understanding on the part of the fathers of the existence of the dominant and servient elements of our population.[41] If the court felt the fundamental character of this proposition it would probably be more receptive to statutes like that in the instant case. The labor element in Arizona was sufficiently intelligent and powerful to force the passage of the instant statute. The probable result of it, if sustained, would have been to satisfy the labor population and not unreasonably diminish the property rights of employers. At the most, the movement toward compulsory arbitration would have been accelerated. The frustration, upon invalid grounds, of this attempt legally to remedy their difficulties, can but breed dissatisfaction.

DIRECTED VERDICT UNDER THE NEW YORK CIVIL PRACTICE ACT.—Section 457(a) of the New York Civil Practice Act provides that the " . . . judge may direct a verdict when he would set aside a contrary verdict as against the weight of evidence." The provision is new, and changes the New York law. There was considerable confusion among the earlier authorities in this state with respect to when a verdict could be directed, some cases apparently applying the test adopted by the Civil Practice Act,[1] others clearly repudiating it.[2] The rule, in the absence of statute, was definitely settled in 1901 by the case of *McDonald* v. *Metropolitan Street Railway Co.*,[3] where the court explicitly declared that the fact that an opposite verdict could be set aside as against the weight of all the evidence did not constitute grounds for directing a verdict,[4] though a verdict might be directed when a contrary one would have to be set aside for lack of more than a scintilla of evidence.[5] Until changed by the Civil Practice Act, this doctrine remained the New York law.[6] It is still law in the majority of jurisdictions[7] including the

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[41] Beard, *Economic Interpretation of the United States Constitution* (1913).

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[1] *Dwight* v. *Germania Life Ins. Co.* (1886) 103 N. Y. 341, 8 N. E. 654; *Linkauf* v. *Lombard* (1893) 137 N. Y. 417, 33 N. E. 472, and cases cited therein; see *Hemmens* v. *Nelson* (1893) 138 N. Y. 517, 529, 34 N. E. 342. *Fealey* v. *Bull* (1900) 163 N. Y. 397, 57 N. E. 631, attempts to distinguish the last two cases on the ground that actually there never was more than a scintilla of evidence. *Cf. Stuart* v. *Simpson* (N. Y. 1828) 1 Wend. 376.

[2] *Bagley* v. *Bowe* (1887) 105 N. Y. 171, 11 N. E. 386. In *Fealey* v. *Bull, supra,* footnote 1, p. 400, the court quotes *Colt* v. *Sixth Avenue R. R.* (1872) 49 N. Y. 671, as follows: "It is not enough to justify a nonsuit that the court on a case made might, in the exercise of its discretion, grant a new trial and give the parties the privilege of submitting the questions of fact to a new jury. The evidence may be sufficient in law to sustain a verdict, although so greatly against the apparent weight of evidence as to justify the granting of a new trial."

[3] 167 N. Y. 66, 60 N. E. 282.

[4] "While in many cases, even where the evidence is sufficient to sustain it, a verdict may be properly set aside and a new trial ordered, yet, that in every such case the trial court may whenever it sees fit, direct a verdict, and thus forever conclude the parties, has no basis in the law, which confides to juries and not to courts the determination of the facts in this class of cases." *Ibid.* 69.

[5] *Ibid.* 70. See also *Fealey* v. *Bull, supra,* footnote 1.

[6] *Getty* v. *Williams Silver Co.* (1917) 221 N. Y. 34, 116 N. E. 381; *Seyford* v. *Southern Pacific Co.* (1916) 216 N. Y. 613, 111 N. E. 248; *Padbury* v. *Metropolitan St. Ry.* (1902) 71 App. Div. 616, 75 N. Y. Supp. 952.

[7] *E. g., Little Rock, etc. Ry.* v. *Henson* (1882) 39 Ark. 413; *Bailey* v. *Robison* (1908) 233 Ill. 614, 84 N. E. 660; *Buford* v. *Louisville & Nashville R. R.* (1884) 82 Ky. 286; *McDonough* v. *Metropolitan Life Ins. Co.* (1917) 228 Mass. 450, 117 N. E. 836; *Clark* v. *Stitt* (1894) 12 Ohio C. C. 759; *Dinan* v. *Supreme Council* (1904) 210 Pa. 456, 60 Atl. 10; *Lewis* v. *Prien* (1897) 98 Wis. 87, 73 N. W. 654; see *Altee* v. *Railway Co.* (1884) 21 S. C. 550, 558; *Drew* v. *Lawrence* (1916) 37 S. Dak.

federal courts, as is indicated by the recent case of *Begert* v. *Payne* (C. C. A. 6th Cir. 1921) 274 Fed. 784.

The purpose of section 457(a) apparently was to decrease the number of new trials and to substitute a simple test for one that was perplexing to both judges and lawyers. Simplicity is indisputably a virtue, but it is worth pausing to consider whether the advantage thus gained may not necessitate leaving disputed questions of fact to the court, thereby undermining our cherished tradition that the determination of such facts is for the jury.

At one time the rule seems to have been that if a party bearing the burden of going forward with the evidence [8] introduced even the minutest evidence to support his contention, the case had to be submitted to the jury, notwithstanding that there was only one possible verdict which could reasonably be rendered.[9] The courts gradually adopted the practice of taking a case from the jury not merely when there was no evidence, but also when not more than a scintilla of evidence was proffered.[10] This is the rule in practically every jurisdiction today.[11] It is conceivable that a judge might conclude, after verdict, that the party having the burden of going forward had not introduced more than a scintilla of evidence, and that he erred in refusing to nonsuit [12] or to direct a verdict at the trial. In such a case, if there is no statutory provision for a judgment notwithstanding the verdict, on the ground of insufficiency of proof,[13] it is the duty of the judge to set aside the verdict and grant a new trial.[14] It is to that situation that the majority of courts undoubtedly refer when they assert that a court "may . . . direct . . . where the evidence . . . is of such a conclusive character that the court in the exercise of its sound judicial discretion would be compelled to set aside a verdict returned in opposition to it." [15] Such a rule, thus interpreted, is not inconsistent with the proposition set forth in the *McDonald* case, for while it may be true that a judge should direct a verdict whenever he would be under a duty to set aside a contrary one for lack of more than a scintilla of evidence to

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620, 624, 159 N. W. 274; *Mount Adams Ry.* v. *Lowery* (C. C. A. 1896) 74 Fed. 463, 470. See (1911) 11 COLUMBIA LAW REV. 571.

[8] To avoid ambiguity the phrase "burden of going forward with the evidence" is used in preference to the commoner expression "burden of proof," because the latter has a double connotation; *viz.*, the "burden of establishing" and the "burden of going forward."

[9] See *Ryder* v. *Wombwell* (1868) L. R. 4 Exch. 32, 39; *Improvement Co.* v. *Munson* (U. S. 1871) 14 Wall. 442, 448.

[10] *Ewing* v. *Goode* (C. C. 1897) 78 Fed. 442; *Ketterman* v. *Dry Fork R. R.* (1900) 48 W. Va. 606, 37 S. E. 683; see opinion of Maule, *J.*, in *Jewell* v. *Parr* (1853) 13 C. B. *909, *916.

In a few jurisdictions a judge may not direct in favor of one having the burden of establishing, on the ground that the credibility of witnesses is to be determined by the jury. *Giles* v. *Giles* (1910) 204 Mass. 383, 90 N. E. 595; see *Hunter* v. *Wethington* (1907) 205 Mo. 284, 292, 103 S. W. 543.

[11] See 1 Chamberlayne, *Modern Law of Evidence* (1911) § 395; and cases cited *supra*, footnotes 6 and 8.

[12] While at early common law a plaintiff could be nonsuited only by his consent, which is still the practice in the federal courts, today in many jurisdictions the judge may order a compulsory nonsuit or dismiss the complaint for failure of proof. *Romero* v. *Snyder* (1914) 167 Cal. 216, 138 Pac. 1002; *Carroll* v. *Grande Ronde Elec. Co.* (1907) 49 Ore. 477, 75 Pac. 139 (*semble*); see *Rudolph* v. *Sensener* (1912) 39 App. D. C. 385, 387 (federal rule).

[13] At common law a judgment *non obstante veredicto* can be entered only when the record shows an insufficient legal cause of action or defense. *Plunkett* v. *Detroit Elec. Ry.* (1905) 140 Mich. 299, 103 N. W. 620; see *Cruikshank* v. *St. Paul, etc. Ins. Co.* (1899) 75 Minn. 266, 268, 77 N. W. 958.

[14] At common law and in the federal courts today, in such a case the extent of the appellate court's power is to grant a new trial. *Slocum* v. *New York Life Ins. Co.* (1913) 228 U. S. 364, 33 Sup. Ct. 523.

[15] *Delaware, etc. R. R.* v. *Converse* (1891) 139 U. S. 469, 472, 11 Sup. Ct. 569.

support it, it by no means follows that he could direct whenever he would have the power to set aside a contrary verdict. A judge may decide that the party having the burden of going forward has introduced sufficient evidence to make out a case for the jury, and that, therefore, a verdict may not be directed. Nevertheless, in view of all the evidence he may in many jurisdictions set the jury's verdict aside as against the weight of evidence, remanding the case for a new trial.[16] The courts of some jurisdictions, overlooking this distinction and misapplying the broad test suggested by the majority of cases,[17] have held that a court can direct whenever it could set aside the opposite verdict as against the weight of evidence.[18] The value of such a rule is questionable.

In setting aside a verdict the judge weighs all the conflicting evidence to determine if the jury's finding was a reasonable one. In so doing he does not finally dispose of the disputed question of fact, but merely sends back the case for a new trial. When a verdict is directed, however, the judge's construction of the evidence is conclusive. If he may direct whenever he could set aside a contrary verdict, as is permitted[19] by the Civil Practice Act, he is given the power of finally weighing, to a certain extent, all the evidence, and of determining the credibility of witnesses. At common law this is strictly within the province of the jury.[20]

Furthermore, it should be noted that while directing a verdict ends the case,[21] setting aside affords the parties another jury hearing. If a second jury finds the same way, although on the identical evidence, it is not improbable that the judge, influenced thereby, might sustain the second verdict.[22] Thus a motion for a

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[16] *Derrick* v. *Harwood Elec. Co.* (1920) 268 Pa. St. 136, 111 Atl. 48; see cases cited *supra,* footnotes 3 and 6; 1 Chamberlayne, *op. cit.* § 308. In *Drew* v. *Lawrence, supra,* footnote 6, p. 625, the court said: "Inasmuch as the law presumes that a new trial of a cause will result in a just judgment, there is vested in trial courts a wide discretion to set aside verdicts and grant new trials; which discretion will seldom be disturbed by an appellate court, even though from a reading of the record on appeal it appears that the jurymen fairly exercised the reasoning faculty in arriving at their verdict."

[17] *Supra,* footnote 13.

[18] *Wellington* v. *Corinna* (1908) 104 Me. 252, 71 Atl. 889; *Hinckley* v. *Danbury* (1908) 81 Conn. 241, 70 Atl. 590; *cf. Fox* v. *Southern Pacific Co.* (1892) 95 Cal. 234, 30 Pac. 384.

[19] The Civil Practice Act, in providing that the " . . . judge may direct . . . ", appears to give the court some discretion. But so long as the judge has the power to base a directed verdict upon all the evidence of both parties, the consequences designated in the text are possible.

[20] *Baumann* v. *Hamburg-American Packet Co.* (1902) 67 N. J. L. 250, 51 Atl. 461. Of course the judge does not weigh absolutely all the evidence in such a case; but he nevertheless weighs it to the extent of determining whether the jury could reasonably find for the party having the burden of going forward in view of the opposing evidence. It is true that even under the rule of the *McDonald* case the judge, upon motion to direct the verdict, does consider whether the evidence proffered by the party having the burden of going forward, coupled with any evidence favorable to him introduced by the other party, is sufficient to support a verdict in favor of the former. *Bopp* v. *N. Y. El. Vehicle Transp. Co.* (1903) 177 N. Y. 33, 69 N. E. 122 (where, on the basis of facts admitted by a co-defendant, a nonsuit was denied both defendants, although the evidence which the plaintiff originally had presented might have been sufficient to warrant a submission of the case to the jury). That is different, however, from balancing the evidence of both parties and determining which should be believed.

[21] This case like any other may be appealed.

[22] Such an assumption seems more justifiable than the supposition that having once set aside a verdict a judge will continue to set it aside if again rendered on the same evidence. "The time might come when it would be the duty of the court to yield even to the perversities of the jury and not any longer interfere with their verdict, but two verdicts are not ordinarily conclusive of that duty. Three verdicts have sometimes been thought sufficient . . . " *Wright* v.

directed verdict should be granted with more hesitancy than a motion for a new trial.[23] The New York Civil Practice Act, however, allows a court to ignore this difference.

If it be conceded that a curtailment of new trials justifies a limited encroachment on the province of a jury, then it is to be noted that the rule adopted in the Civil Practice Act partially fails of its object, inasmuch as it does not prevent a new trial in the case where a judge commits the error of directing the verdict when he could not even have set aside a contrary one. The difficulty of determining when a verdict may be set aside makes such an error probable.

A Minnesota statute, aimed at the elimination of unnecessary new trials, provided as follows: "When at the close of the testimony any party to the action moves the court to direct a verdict in his favor, and the adverse party objects thereto, such motion shall be denied and the court shall submit to the jury such issue or issues within the pleadings on which any evidence has been taken, as either or any party to the action shall request, but upon a subsequent motion, by such moving party after verdict rendered in such action, that judgment be entered notwithstanding the verdict, the court shall grant the same if, upon the evidence as it stood at the time such motion to direct a verdict was made, the moving party was entitled to such directed verdict." [24] Such a statute does away with the necessity of a new trial and the impanelling of a new jury in case of an erroneous direction. If, on appeal, the judgment is reversed, the verdict is merely reinstated. However, under the Minnesota statute a new trial is not prevented in the case where the judge could not direct, but has set aside the verdict as against the weight of evidence.[25]

A more efficient method of avoiding new trials might possibly be found in a combination of the New York and Minnesota statutes, *i. e.,* by requiring the court to submit to the jury every issue upon which more than a scintilla of evidence has been introduced, and then allowing[26] the court to enter a judgment *non obstante veredicto* whenever a contrary verdict could have been set aside as against the weight of the evidence. A new trial would thus be prevented in practically every case,[27] for if the judgment notwithstanding the verdict is reversed, the appellate court would merely need to reinstate the verdict. If the verdict is against the weight of evidence the judgment *non obstante veredicto* would

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Southern Exp. Co. (C. C. 1897) 80 Fed. 85, 92; *Hyde* v. *Haak* (1903) 132 Mich. 364, 93 N. W. 876.

[23] "But it seems unsound on principle to assert such an identity for two reasons,—in the first place, because the mass of evidence in the two situations is very different (for after verdict the defendant's evidence has to be considered with the rest), and in the next place, because the setting aside of a verdict leads merely to a new trial, while the ruling of insufficiency leads usually to the direction of a verdict for the opponent (post § 2495), and therefore a total quantity of the proponent's evidence which would justify the former might be more than would justify the latter." 4 Wigmore, *Evidence* (1905) § 2494.

[24] Minn. Gen. Stat. (1913) § 7998. This statute has since been repealed. See *Church of the Immaculate Conception* v. *Curtis* (1915) 130 Minn. 111, 119, 153 N. W. 259.

[25] The act was intended to apply only to those cases where the court could have directed a verdict at common law. See *Cruikshank* v. *St. Paul Ins. Co., supra,* footnote 13, p. 268.

[26] The judge should not be completely deprived of his power to set aside a verdict, as a case may arise when he believes one of the parties has not had a fair opportunity to prove his point, and justice demands that another trial be granted.

[27] The only case where a new trial would not be prevented would be when the judge directed a verdict because he erroneously thought not more than a scintilla of evidence had been introduced, although as a matter of fact a contrary verdict could not even have been set aside as against the weight of evidence. This kind of error, however, is hardly apt to occur.

be affirmed. Such a procedure would of course entail the often lengthy process of obtaining a jury verdict in many cases where, under Section 457(a) of the Civil Practice Act, a verdict would be directed. Whether the saving of new trials would more than compensate for the time and trouble thus necessitated could only be determined by experiment.

EFFECT OF ALTERATION OF A NEGOTIABLE INSTRUMENT UPON DRAWEE'S ACCEPTANCE OR PAYMENT.—Interesting and novel is the problem that has arisen in the recent case of *National City Bank of Chicago* v. *National Bank of the Republic of Chicago* (Ill. 1921) 132 N. E. 832. X stole a draft and, after skillfully substituting his name for that of the original payee, offered it to Y in payment for jewelry. Y had the draft accepted by the drawee bank and then parted with the jewelry on the faith of the acceptance. Y deposited the instrument in the defendant bank which collected from the drawee. Having learned of the alteration, the drawee sought to recover the amount of the draft from the defendant, as money paid by mistake. The court denied recovery on the ground that the drawee by accepting admitted the existence of the payee and his capacity to indorse.

Under the doctrine of *Price* v. *Neal*,[1] adopted by the Negotiable Instruments Law,[2] a drawee who has paid a check or draft to which the drawer's name has been forged, cannot recover the sum paid.[3] This exception to the general rule of law permitting recovery of money paid under a mistake of fact has usually been extended to the case of certification or payment by a drawee bank in misreliance on the state of the drawer's account.[4] But the marked tendency is to limit this doctrine strictly and to favor the application of the usual rules governing mistakes. Hence, many courts have arbitrarily assumed negligence and have allowed recovery by the drawee in the absence of prejudicial change of position by a bona fide purchaser for value.[5] Where the indorsement of the payee or other indorser has been forged, the drawee can generally recover the money paid.[6] Where both the drawer's and payee's signatures have been forged, opposite results have been reached, the sounder view, assuming *Price* v. *Neal* is law, denying recovery by the

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[1] (1762) 3 Burr. 1354.

[2] N. I. L. § 62. In fact, this section only covers an acceptance, but it is generally agreed that by implication it includes actual payment.

[3] *State Bank* v. *Cumberland Savings & Trust Co.* (1915) 168 N. C. 605, 85 S. E. 5; *Cherokee Nat. Bank* v. *Union Trust Co.* (1912) 33 Okla. 342, 125 Pac. 464; *McClendon* v. *Bank of Advance* (1915) 188 Mo. App. 417, 174 S. W. 203. This doctrine is unfortunate in the sense that it disrupts an otherwise settled rule of law and produces logical inconsistencies.

[4] See (1921) 21 COLUMBIA LAW REV. 805.

[5] *Newberry Savings Bank* v. *Bank of Columbia* (1911) 91 S. C. 294, 74 S. E. 615; *Canadian Bank of Commerce* v. *Bingham* (1907) 46 Wash. 657, 91 Pac. 185; *Williamsburg Trust Co.* v. *Tum Suden* (1907) 120 App. Div. 518, 105 N. Y. Supp. 33; *National Bank of California* v. *Miner* (1914) 167 Cal. 532, 140 Pac. 27, (*semble*); *Baldinger & Kupferman Manufacturing Co.* v. *Manufacturers-Citizens Trust Company* (1915) 93 Misc. 94, 156 N. Y. Supp. 445 (*semble*); see (1921) 21 COLUMBIA LAW REV. 805, 807.

[6] *United States Mortgage & Trust Co.* v. *Liberty National Bank* (1920) 112 Misc. 149, 184 N. Y. Supp. 32; *Farmers' Bank & Trust Co.* v. *Farmers' State Bank* (Ark. 1921) 231 S. W. 7; *State* v. *Merchants' National Bank of St. Paul* (1920) 145 Minn. 322, 177 N. W. 135; *Leather Manufacturers' Bank* v. *Merchants' Bank* (1888) 128 U. S. 26, 9 Sup. Ct. 3 (before N. I. L.). The reason advanced in the last two cases for holding the collecting bank liable on its indorsement seems wrong, for the drawee is not a purchaser. *Cf. Cherokee Nat. Bank* v. *Union Trust Co., supra,* footnote 3. Otherwise *Price* v. *Neal* would have to be denied also, since the holder upon indorsing would be warranting the drawer's signature. Such a result has actually been reached where the indorser was the payee. *Williamsburg Trust Co.* v. *Tum Suden, supra,* footnote 5.